

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

**RESPONSE TO DEFENDANT'S MOTION TO DISMISS**  
**PLAINTIFF'S VERIFIED COMPLAINT**

Plaintiff, Bank of America, N.A., by and through its undersigned counsel, for its Response to Defendant Magruder Construction Co., Inc.'s Motion to Dismiss Plaintiff's Verified Complaint states as follows:

1. On or about April 28, 2014, Plaintiff filed its Complaint.

2. On or about May 28, 2014, Defendant filed its Motion to Dismiss Plaintiff's Verified Complaint asserting that the Paragraph 12.4 of the Loan Agreement, attached to Plaintiff's Verified Complaint as Exhibit 1 ("Loan Agreement"), requires binding arbitration, and therefore, Plaintiff's action should be dismissed.

3. However, Paragraph 12.4(f) of the Loan Agreement provides in pertinent part: "This paragraph does not limit the right of any party to: . . . (iv) act in a court of law to obtain an interim remedy, such as but not limited to, injunctive relief, writ of possession or appointment of a receiver, or additional supplementary remedies."

4. Under Paragraph 6(l) of the Security Agreement attached to Plaintiff's Verified Complaint as Exhibit 2 ("Security Agreement"), Defendant consented to the appointment of a receiver "and agree[d] not to oppose any such appointment".

5. Under Paragraph 2, the Security Agreement secures all “indebtedness” of Defendant to Plaintiff, which includes the Loan Agreement and Leasing Note.

6. Plaintiff’s Complaint is seeking to obtain interim remedies such as injunctive relief and the appointment of a receiver, and, in fact, Plaintiff has been heard by this Court on its Motion for Temporary Restraining Order, Motion for Preliminary Injunction, and Motion for Appointment for a Receivership.

7. Accordingly, this Court has jurisdiction over Plaintiff’s Motion for Temporary Restraining Order, Motion for Preliminary Injunction, and Motion for Appointment of a Receiver.

8. Further, Count II of Plaintiff’s Verified Complaint alleges a breach of the Leasing Note attached as Exhibit 5 to Plaintiff’s Verified Complaint (“Leasing Note”).

9. The Leasing Note does not contain an arbitration clause and is therefore not subject to arbitration.

10. Accordingly, this Court has jurisdiction over Count II of Plaintiff’s Verified Complaint.

WHEREFORE, Plaintiff, Bank of America, N.A., prays this Court deny Defendant Magruder Construction Co., Inc.’s Motion to Dismiss Plaintiff’s Verified Complaint and grant such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

**LATHROP & GAGE LLP**

By: /s/ Michael A. Clithero  
Michael A. Clithero #31402MO  
Alicia M. Kerr, #63931MO  
Pierre Laclede Center  
7701 Forsyth Boulevard, Suite 500  
Clayton, Missouri 63105  
Telephone: (314) 613-2800  
Telecopier: (314) 613-2801  
mclithero@lathropgpage.com  
akerr@lathropgpage.com

**Attorneys for Plaintiff Bank of  
America, N.A.**

**CERTIFICATE OF SERVICE**

I hereby that on this 4<sup>th</sup> day of June, 2014, the above and foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and notification of such filing was sent via the Court's CM/ECF system.

/s/ Michael A. Clithero